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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of	)	
IMPLEMENTATION OF THE LOCAL COMPETITION PROVISIONS IN THE TELECOMMUNICATIONS ACT OF 1996	)	**CC Docket No. 96-98**

RESPONSE OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION TO REPLIES TO PETITIONS FOR RECONSIDERATION

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Section 1.429(g) of the Commission's Rules, 47 C.F.R. § 1.429(g), hereby responds to replies filed in support of petitions for reconsideration of the Commission's First Report and Order, FCC 96-325, released by the Commission in the captioned docket on August 8, 1996, submitted by Time Warner Communications, Inc. ("Time Warner"), the National Cable Television Association, Inc. ("NCTA"), and the Local Exchange Carrier Coalition ("LEC Coalition"). TRA opposed the Time Warner, NCTA and LEC Coalition petitions for reconsideration to the extent that they advocated changes intended to undermine the viability of traditional "total service" resale as a local market entry strategy.

I.

INTRODUCTION

In its earlier-filed reply to the Time Warner, NCTA and LEC Coalition petitions for reconsideration, TRA applauded the Commission for providing economically and

operationally viable opportunities for non-facilities-based entry by small and mid-sized resale carriers into the local exchange telecommunications market. In particular, TRA commended the Commission for its recognition that the Telecommunications Act of 1996 ("1996 Act")[1] not only contemplated three separate and coequal paths of entry into the local market -- one of which was traditional "total service" resale -- but "neither explicitly nor implicitly expresse[d] a preference for one particular entry strategy."[2] TRA emphasized that the Commission had paved the way for a viable local resale market by, among other things, adopting a "reasonably avoided" cost standard for sizing the differential between "retail" and "wholesale" costs, pursuant to which "avoided costs" would be deemed to be "those that an incumbent LEC would no longer incur if it were to cease retail operations and instead provide all of its services through resellers,"[3] and by presuming that restrictions on resale are "presumptively unreasonable."[4]

TRA, accordingly, vigorously opposed claims by Time Warner and NCTA that Section 252(d)(3) mandates use of an "actually avoided" rather than a "reasonably avoidable" standard, that the Commission wrongfully included a number of Uniform System of Accounts ("USOA") cost and expense accounts in the "avoidable cost" basket, and that the default range of wholesale discounts established in the First Report and Order was arbitrary.[5] TRA also opposed efforts by Time Warner to preclude resale carriers from obtaining unbundled network

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[1] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[2] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325, ¶ 12 (released August 8, 1996), *pet. for rev. pending sub nom.* Iowa Utilities Board v. FCC, Case No. 96-3321 (8th Cir. Sept. 5, 1996) ("Local Competition Order").

[3] Id. at ¶ 911.

[4] Id. at ¶ 939.

[5] Comments of Time Warner at 3 - 18; Comments of NCTA at 14 - 20.

elements, as well as attempts by the LEC Coalition to exclude customer-specific contracts from the Section 251(c)(4) resale requirement and to deny resale carriers operations support and rebranding opportunities.[6]

In this filing, TRA addresses the comments filed by certain incumbent local exchange carriers ("ILECs") in support of the Time Warner, NCTA and LEC Coalition petitions for reconsideration, including comments filed by Bell Atlantic, Southern New England Telephone Company ("SNET") and U S WEST, Inc. ("U S WEST").

II.

ARGUMENT

A. The Support for Time Warner's and NCTA's Claims that the Commission's Methodology for Computing and Default Range of Wholesale Discounts are Flawed is Virtually Nonexistent

The deafening silence in this docket is the virtually complete lack of support for the objections of Time Warner and NCTA to the methodology adopted by the Commission in the First Report and Order for computing the wholesale/resale differential and Time Warner's claim that the Commission's default range of wholesale discounts is excessive and arbitrary. Bell Atlantic dedicates a single sentence to Time Warner's views.[7] Only U S WEST expends any effort attempting to shore up Time Warner's and NCTA's contentions.[8] In other words, none of the more obvious beneficiaries of reduced wholesale discounts, including other ILECs and full

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[6] Comments of Time Warner at 18 - 22; Comments of LEC Coalition at 2 - 5, 20 - 22.

[7] Comments of Bell Atlantic at 7.

[8] Comments of U S WEST at 8 - 10.

or partial facilities-based competitive local exchange carriers ("CLEC"), perceived sufficient merit in Time Warner's and NCTA's contentions to take up the cudgel. Apparently the ILECs and the full or partial facilities-based CLECs, including other cable television ("CATV") providers, recognized that while they might have preferred wholesale discounts that would have hamstrung local resale providers, the Commission's "reasonably avoidable" cost standard, its methodology for computing reasonably avoided costs and its default range of wholesale discounts were fully defensible.

Worse yet, Bell Atlantic's toss away and U S WEST's more impassioned support for Time Warner and NCTA actually serve by use of hyperbole and gross exaggerations to further undermine these petitioners positions. Thus, U S WEST repeatedly characterizes 17 to 25 percent discounts as "massive," while Bell Atlantic makes reference to "'excessively discounted rates' that artificially favor one class of competitors."[9] Not to be outdone, U S WEST declares that the wholesale discounts adopted by the Commission are "confiscatory and anticompetitive."[10] Such "purple prose" would be amusing but for the potentially devastating impact a significant reduction in wholesale discounts would have on the prospects of small and mid-sized carriers entering the local exchange market through "total service" resale.

TRA submits that there is an "Alice-through-the-looking-glass" quality to claims by ILECs that wholesale discounts should be reduced in order to protect "more efficient facilities-based competitors" from TRA's resale carrier members. Do the ILECs truly wish to facilitate construction of alternate physical networks, thereby speeding the advent of facilities-based

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[9] Comments of U S WEST at 8 - 9; Comments of Bell Atlantic at 7.

[10] Comments of U S WEST at 8.

competition, or do they wish to preserve their monopoly bastions, knowing full well that facilities-based competition will not occur in most markets for years, if ever? Isn't it likely that the ILECs are well aware that local resale competition will be far more immediate and that small and mid-sized resale carriers have proven to be the most effective competitors in the interexchange market over the past five years,[11] and hence, isn't it likely that the ILECs might be inclined to undermine the likely entry vehicle of choice of such carriers. Obviously, the ILECs and Time Warner and NCTA are attempting to cloth protectionist tactics in public interest rhetoric.

As TRA stressed in its earlier-filed reply, the 1996 Act provided for three separate and coequal paths of entry into the local market and did not prefer any of these three entry vehicles over any other.[12] Certainly, the 1996 Act did not anoint CATV providers or any other entity that may have constructed, or may construct in the future, physical facilities as the primary source of local exchange competition. Hence, the 1996 Act provides no basis for suggestions that wholesale discounts in the range of 17 to 25 percent will "artificially favor" resale carriers over facilities-based providers, "stifle" facilities-based competition, or "discourage investment in new facilities" are laughable.[13]

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[11] As the Commission is aware, the aggregate market share of small to mid-sized interexchange carriers over the past five years has risen dramatically as the market share of AT&T has declined and the market shares of MCI and Sprint have stagnated or increased incrementally. "Long Distance Market Shares Second Quarter 1996," Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, pp. 2 - 3, Tables 5 & 6 (September 1996) ("Smaller carriers increased their share of the market five-fold, increasing from less than 3% in 1984 to more than 14% in 1995.")

[12] 47 U.S.C. § 251(c)(4); Local Competition Order, FCC 96-325 at ¶ 12.

[13] Comments of U S WEST at 8 - 9; Comments of Bell Atlantic at 7.

First, as TRA explained in its earlier-filed reply, facilities-based entrants will be possessed of a host of competitive advantages not available to resale carriers, not the least of which is the availability of unbundled network elements at cost. Hence, it is hard to conceive of how a mere 17 to 25 percent discount off retail rates would artificially favor resale carriers or produce anticompetitive results. Second, the relative cost of providing service through resale or through alternate "virtual," combined "virtual"/physical or entirely physical networks is only one factor considered by carriers in determining whether to deploy physical facilities. In the interexchange industry, for example, resale carriers deploy switches not only for purely economic reasons, but in order to better safeguard their carrier confidential data and to speed provisioning of service orders, among other reasons. And among resale interexchange carriers the clear trend has been toward "switched," as opposed to "switchless," resale. Thus, the suggestion that a resale differential substantially less than is generally available in the interexchange market will deter investment in local network facilitates is without foundation. As the Commission correctly recognized, many new entrants into the local exchange market will rely entirely on resale initially and gradually deploy local network facilities thereafter.[14]

Three additional points made by U S WEST in support of Time Warner are worthy of further note. First, U S WEST's declaration that the Commission is seemingly unaware of what activities are supported by the costs allocated to various accounts in the USOA is remarkable for its offensiveness. Second, U S WEST's assertion that if the Commission persists in its exclusion from wholesale rates of the product management functions allocated to Account 6611, U S WEST will strip product support services from services provided to resale carriers is

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[14] Local Competition Order, FCC 96-325 at ¶ 10.

a blatant declaration of defiance which the Commission should not, and cannot, tolerate; ILECs cannot be permitted to effectively take upon themselves the right to determine with which rules, regulations and other legal requirements they will abide. Third, U S WEST's claim that "marketing expense incurred by incumbent LECs is directly beneficial to resellers" is highly entertaining. U S WEST may well be the first commenter to argue before the Commission not only that the marketing it undertakes benefits all its competitors, but that all such other competitors accordingly should fund its promotional activities.

B. The Commission Should Not Exempt Market Trials or Customer-Specific Contract Offerings From ILEC Services Required to be Made Available to Resale Carriers at Wholesale Rates

In its earlier-filed reply to the LEC Coalition's contention that ILECs should not be required to make market trials and customer-specific contract offerings available to resale carriers at wholesale rates,[15] TRA agreed with the Commission that not only did the clear language of Section 251(c)(4) not provide for such an exception,[16] but that exclusion of market trials and customer-specific contract offerings "would permit incumbent LECs to avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act."[17] SNET takes up the LEC Coalition's cause in this regard, arguing that "[m]arket trials and customer-specific contract offerings typically are not provided at retail," that the Commission's logic for exempting 90-day promotions applies with equal force to market trials and customer-specific offerings, and that any resale restrictions

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[15] Comments of the LEC Coalition at 2 - 3.

[16] 47 U.S.C. § 251(c)(4).

[17] Local Competition Order, FCC 96-325 at ¶ 948.

imposed on market trials or customer-specific offerings would be reasonable.[18] SNET is wrong on all counts.

As to its suggestion that market trials and customer-specific offerings are not retail services, SNET is drawing meaningless semantic distinctions. An offering is no less a retail offering because it may be available only for a limited duration or may be offered to a limited universe of users. Retail is distinguished from wholesale by to whom and for what purpose the offering is made available. A retail service is a service provided directly to end users; a wholesale service is a service provided to an intermediary that will in turn provide it directly to end users. ILECs provide market trials and customer-specific offerings to end users and hence these are retail services that must be made available for resale at wholesale rates under Section 251(c)(4).

SNET's suggestion that the Commission's logic for exempting 90-day promotions applies with equal force to market trials and customer-specific offerings is no less flawed. In carving out an exemption for promotional offerings of up to 90 days, the Commission while expressing its belief that "promotions that are limited in length may serve pro-competitive ends through enhancing marketing and sales-based competition," was nonetheless careful not only to strictly limit the duration of such promotions, but to impose a variety of conditions to reduce their "anticompetitive potential." With respect to contract and other customer-specific offerings, the Commission found that the "anticompetitive potential" was simply too great to provide for any exemption. As noted above, the Commission concluded that a general exemption from the wholesale requirement for such offerings "would permit incumbent LECs to avoid the statutory

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[18] Comments of SNET at 4 - 7.

resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act."[19] One need only look at the thousands of AT&T contract tariffs, MCI special customer arrangements and Sprint custom network service arrangements to appreciate how the exception could easily overwhelm the whole.

Finally, a restriction on resale for market trials and contract offerings is not, contrary to SNET's assertions, reasonable. As the Commission made abundantly clear, such a general exception brings with it substantial anticompetitive potential. Certainly, this assessment is not altered by claims that a resale requirement on market trials would limit ILECs' ability to properly test new technologies. Market trials are not designed to determine whether a product works; they are intended to ascertain whether a product sells. Moreover, market trials could be strategically manipulated both as to length and target audience so as to provide an extremely effective means of providing services that resale carrier competitors could not offer.

The Commission's instincts were absolutely correct. Exemptions from wholesale requirements are subject to abuse, and will be abused, and hence should be as narrowly limited as possible.

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[19] Local Competition Order, FCC 96-325 at ¶ 948.

III.

CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association once again urges the Commission to reject to the extent noted herein and in its earlier-filed reply, the petitions seeking reconsideration of the First Report and Order filed by Time Warner Communications, Inc., the National Cable Television Association, Inc., and the Local Exchange Carrier Coalition.

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CERTIFICATE OF SERVICE

I, Jeannine M. Greene, do hereby certify that I have this 12th day of November, 1996, caused copies of the foregoing documment to be mailed by first class U.S. mail, postage prepaid, to the individuals listed on the attached service list.

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